CHECKLIST, PART 2: IS THERE A VALID SEARCH WARRANT?
Revised July 2017

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I. SEARCH WARRANTS

The purpose of the warrant requirement in both the search and the arrest contexts is to place a neutral magistrate between an officer engaged in the often competitive enterprise of ferreting out crime and the constitutional safeguards on an individual's freedom from undue governmental intrusion. Although they serve the same constitutional purpose, arrest warrants and search warrants protect different interests; an arrest warrant protects a person against an unreasonable seizure, while a search warrant protects a person's privacy interests in his or her home or possessions. *State v. Hyde*, 186 Ariz. 252, 268 (1996). A search conducted pursuant to a search warrant is presumed to be a valid search. *State ex rel. Collins v. Superior Court*, 129 Ariz. 156, 158 (1981). The reviewing court must presume a search warrant is valid; it is the defendant's burden to prove otherwise. *State v. Crowley*, 202 Ariz. 80, 83, ¶ 7 (App. 2002).

A. Statutory Provisions

In Arizona, the statutory provisions for search warrants are as follows.

A search warrant is an order in writing issued in the name of the State of Arizona, signed by a magistrate, directed to a peace officer, commanding him to search for personal property. A.R.S. § 13-3911. A search warrant may be issued on any of the following grounds: (1) when the property to be seized has been embezzled; (2) when the property or things to be seized were used as a means of committing a public offense; (3) when the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it

or preventing it being discovered; (4) when property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed or tends to show that a particular person has committed the public offense; (5) when the property is to be searched and inspected by an appropriate official in the interest of public health, safety, or welfare as part of an inspection program authorized by law; and (6) when the person sought is the subject of an outstanding warrant. A.R.S. § 13-3912.

No search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched. A.R.S. § 13-3913.

Before issuing a warrant, the magistrate may examine on oath the person or persons seeking the warrant and any witnesses produced, and must take their affidavits in writing and cause the affidavit to be subscribed by the party or parties making the affidavit. Before issuing the warrant, the magistrate may also examine any other sworn affidavit that is submitted which sets forth facts tending to establish probable cause for the issuance of the warrant. A.R.S. § 13-3914(A). The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist. A.R.S. § 13-3914(B). In lieu of, or in addition to, a written affidavit, or affidavits, as provided in subsection § 13-3914(A), the magistrate may take an oral statement under oath which must be recorded on tape, wire or other comparable method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication, and is deemed to be an affidavit for the purposes of issuance of a search warrant. If a recording of the sworn statement is

made, the statement must be transcribed at the request of the court or either party and certified by the magistrate and filed with the court. A.R.S. § 13-3914(C).

If the magistrate is satisfied that probable cause for the issuance of the warrant exists, the magistrate must issue a search warrant commanding a search by any peace officer of the person or place specified, for the items described. A.R.S. § 13-3915(A). On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate must authorize an unannounced entry. A.R.S. § 13-3915(B).

The warrant must be in substantially the following form:

> County of _____, state of Arizona.
>
> To any peace officer in the state of Arizona:
>
> Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) there is probable cause for believing that (stating the grounds of the application) according to § 13-3912, you are therefore commanded in the daytime (or in the night, as the case may be, according to § 13-3917) to make a search of (naming persons, buildings, premises or vehicles, describing each with reasonable particularity) for the following property, persons or things: (describing such with reasonable particularity), and if you find such or any part thereof, to retain such in your custody subject to § 13-3920.
>
> Given under my hand or direction and dated _____ (judge, justice of the peace or magistrate.)

A.R.S. § 13-3915(C).

The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate; this warrant must be called a "duplicate

original search warrant" and deemed a search warrant. In such cases, the magistrate must create an original warrant and enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate must file the original warrant and the duplicate original warrant as provided in § 13-3923. A.R.S. § 13-3915(D). A magistrate may affix his or her signature on a FAX of an original warrant; the FAX is deemed to be a search warrant for the purposes of this chapter. On return of the FAX, the magistrate must file the original warrant and the FAX as provided in § 13-3923. A.R.S. § 13-3915(E).

A search warrant may be served by any peace officer but by no other person, except in aid of an officer engaging in service of the warrant. A.R.S. § 13-3916(A). An officer may break into a building, premises or vehicle or any part of a building, premises or vehicle, to execute the warrant when: (1) after notice of the officer's authority and purpose, the officer receives no response within a reasonable time; (2) after notice of the officer's authority and purpose, the officer is refused admittance; (3) a magistrate has authorized an unannounced entry pursuant to § 13-3915; or (4) the particular circumstances and the objective articulable facts are such that a reasonable officer would believe that giving notice of the officer's authority and purpose before entering would endanger the safety of any person or result in the destruction of evidence. A.R.S. § 13-3916(B).

A peace officer executing a search warrant may seize any property discovered in the course of the execution of the warrant if the officer has reasonable cause to believe that the item is subject to seizure under § 13-3912, even if the property is not enumerated in the warrant. A.R.S. § 13-3916(C). A peace officer executing a search

warrant may make photographs, measurements, impressions or scientific tests. A.R.S. § 13-3916(D). A peace officer executing a search warrant directing a search of any premises or a vehicle may search any person in the premises or vehicle if either of the following applies: (1) it is reasonably necessary to protect the officer or others from the use of any weapon that may be concealed upon the person, or (2) it reasonably appears that property or items enumerated in the search warrant may be concealed upon the person. A.R.S. § 13-3916(E).

Upon a showing of good cause therefor, the magistrate may in his or her discretion insert a direction in the warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant may be served only in the daytime; night is defined as the period from ten p.m. to six-thirty a.m. A.R.S. § 13-3917. A search warrant must be executed within 5 calendar days from its issuance and returned to a magistrate within 3 court business days after the warrant is executed. Upon expiration of the 5-day period, the warrant is void unless the time is extended by a magistrate; the time may be extended for no longer than 5 calendar days. The documents and records of the court relating to the search warrant need not be open to the public until the return of the warrant or the warrant is deemed void, unless a magistrate orders the time to be shortened or lengthened for good cause. Thereafter, if the warrant has been executed, the documents and records must be open to the public as a judicial record. A.R.S. § 13-3918(A). If a duplicate original search warrant has been executed, the peace officer who executed the warrant must enter the exact time of its execution on its face. A.R.S. § 13-3918(B).

A person who, with intent to harass and without probable cause, causes a search warrant to be issued and executed, is guilty of a class 2 misdemeanor. A.R.S. § 13-3924.

B. Probable Cause

The Fourth Amendment to the U.S. Constitution requires a search warrant be issued only upon probable cause. The existence of probable cause must be determined by a detached, disinterested magistrate after considering sworn statements. *Frimmel v. Sanders*, 236 Ariz. 232, 239, ¶ 26 (App. 2014). Under A.R.S. § 13-3913: "No search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched."

Magistrates are asked to issue search warrants based upon the integrity of their supporting affidavits, and in the course of those efforts, must rely upon affiants to provide truthful, accurate, and complete information to substantiate the existence of probable cause. *Frimmel v. Sanders*, 236 Ariz. 232, 238, ¶ 23 (App. 2014). A search warrant affidavit must be read in a common sense and realistic manner. *Id*. at 239, ¶ 31 (App. 2014). Sufficient information must be presented to the magistrate to allow that official to determine probable cause; the magistrate's action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). While every fact in the affidavit need not be true, law enforcement officers are not permitted to exaggerate known facts to falsely substantiate the magnitude of a

crime or create probable cause where none exists. *Frimmel v. Sanders*, 236 Ariz. 232, 240, ¶ 35 (App. 2014).

Probable cause exists if given all the circumstances set forth in the affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Probable cause is a somewhat fluid concept that turns on the assessment of probabilities in particular factual contexts. *Id*. at 232. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. *United States v. Leon,* 468 U.S. 897, 914 (1984).

Probable cause exists when the facts known to a police officer would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. The facts need not show it is more likely than not that contraband or evidence of a crime will be found; finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence have no place in the probable cause decision. Instead, all that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act. This practical and common-sense standard depends on the totality of the circumstances. *State v. Sisco*, 239 Ariz. 532, 535, ¶ 8 (2016), *cert. denied*, 137 S. Ct. 701 (2017), *quoting Florida v. Harris*, __U.S.__, 133 S.Ct. 1050, 1055 (2013). Probable cause for issuance of search warrant is a fluid concept, turning on the assessment of probabilities in particular factual contexts, and not readily, or even usefully, reduced to a neat set of legal rules. *State v. Crowley*, 202 Ariz. 80, 85 ¶ 13 (App. 2002).

An officer can rely on his or her senses, including the sense of smell, to establish probable cause if doing so would lead a reasonable person to believe that contraband or evidence of a crime is present. *State v. Sisco*, 239 Ariz. 532, 535, ¶ 9 (2016). Probable cause does not turn on the "innocence" or "guilt" of particular conduct, but instead on the degree of suspicion that attaches to particular types of non-criminal acts. Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity; therefore, innocent behavior frequently will provide the basis for a showing of probable cause. *Id*. at 536, ¶¶ 15-16. However, police must include exculpatory facts that are known to them and material to the probable cause determination in any affidavit in support of a search warrant. *Id.*, ¶ 18.

In *Sisco*, the Court found that notwithstanding the Arizona Medical Marijuana Act (AMMA), the odor of marijuana in most circumstances will warrant a reasonable person believing there is a fair probability that contraband or evidence of a crime is present. 239 Ariz. at 536, ¶¶ 15-16. But because probable cause is determined by the totality of the circumstances and marijuana possession is lawful when done pursuant to AMMA, a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause. *Id*., ¶ 18. Presentation of a valid registry card could indicate that marijuana is being lawfully possessed or used and effectively dispel the probable cause resulting from the officer's detection of marijuana by sight or smell, unless other facts suggest the possession or use is not pursuant to AMMA. Thus, the general proscription of marijuana in Arizona and the AMMA's limited exceptions thereto support finding probable cause based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable

person that the marijuana use or possession complies with AMMA. The Court concluded that this “odor (or sight) unless” standard comports with the Fourth Amendment and gives effect to AMMA's exceptions by precluding officers or magistrates from ignoring indicia of AMMA-compliant marijuana use or possession when assessing probable cause. *Id*., 239 at 538, ¶ 26. *Compare*, *State v. Buccini*, 167 Ariz. 550, 556–58 (1991) (probable cause absent when officer ignored information material to distinction between criminal and non-criminal activity).

1. Informants / Anonymous Tips

(i) Federal

In *Illinois v. Gates*, 462 U.S. 213, 23-234 (1983), SCOTUS adopted the "totality of the circumstances" test to determine when information obtained through an anonymous tip can establish probable cause for a search warrant. The inherently suspect nature of the anonymous tip must be independently corroborated by police observation. *Gates*, 462 U.S. at 238; *accord*, *United States v. Alvarez*, 899 F.2d 833, 837 (9th Cir. 1990). In *Gates*, police received an anonymous letter stating that a couple living in a particular complex were selling drugs and had drugs in their basement. The letter said on a certain date, the wife would drive their car to Florida, drop it off to be loaded up with drugs, and fly back to Illinois; the husband would fly to Florida in a few days and drive the car back to Illinois. After following up and learning the couple had in fact gone to Florida and back on the those dates and that key information in the letter appeared to be accurate, police obtained a search warrant, stopped their car, and found drugs in the trunk. A search of their home yielded drugs, weapons, and other contraband. The Court held the independent police work provided sufficient

corroboration of the tip to justify the magistrate's decision to issue a search warrant. *Id*., 462 U.S. at 241. Although the police knew nothing of the tipster's reliability, their independent investigative work showed the information provided was correct. The anonymous letter provided details, not just about existing conditions at the time of the tip, but also *future actions* of third parties ordinarily not easily predicted. *Id*. at 245.

The same standard applies in the context of reasonable suspicion[1] to justify a traffic stop. In *Alabama v. White*, 496 U.S. 325 (1990), an anonymous tipster told police that at a certain time White would leave a certain apartment in a particular vehicle and take cocaine to a certain motel. Police watched White and saw her leave in that vehicle at the given time and drive towards the motel. They stopped White just before she reached the motel; she consented to a search and the police found drugs. The Court found the tip was sufficient to justify the stop because police were able to corroborate the tipster's predictions of White's *future* behavior. *Id*. at 332.

Other tips from different informants about the same activities may serve as corroboration because "**i**nterlocking tips from different confidential informants enhance the credibility of each." *United States v. Landis*, 726 F.2d 540, 543 (1984); *see also*

[1] Reasonable suspicion is a standard lower than probable cause, and requires only that police have a particularized and objective basis for suspecting that a person is engaged in criminal activity. The reasonable suspicion necessary to justify a stop is dependent upon both the content of information possessed by police and its degree of reliability. The standard takes into account the totality of the circumstances; although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause. *Navarette v. California,* 134 S.Ct. 1683, 1687 (2014) (reasonable suspicion for an investigatory stop may be based on an emergency call to police that bears adequate indicia of reliability); *accord State v. Gomez,* 198 Ariz. 61, ¶¶ 18–19, (App. 2000).

United States v. Nielsen, 371 F.3d 574, 580 (9th Cir. 2004) (veracity of three informants buttressed by the similarity of their accounts). In addition, seemingly innocent conduct may become suspicious in light of the initial tip. *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 528 (9th Cir. 1991), *citing Gates,* 462 U.S. at 243 n. 13. Further, when interpreting seemingly innocent conduct, the court issuing the warrant is entitled to rely on the training and experience of police officers. *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995).

Thus, seemingly innocent conduct may provide the basis for probable cause when viewed in light of all of the information known at the time of the arrest. *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992). But for an anonymous tip to reasonably support an officer's suspicion of criminal activity, it must be accompanied by sufficient indicia of the tip's reliability. *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (anonymous tip stating that a young black male in a plaid shirt standing at a bus stop was carrying a gun lacked sufficient indicia of reliability to establish reasonable suspicion to make *Terry* stop; tip gave no predictive information that would provide police with means to test informant's knowledge or credibility).

(ii) Arizona

In Arizona, an anonymous tip alone is not enough to justify a stop. "The tip must show sufficiently detailed circumstances to indicate that the informant came by his information in a reliable way." *State v. Altieri,* 191 Ariz. 1, 3, ¶ 9 (1997). There, DPS received an anonymous tip that a man was driving a car containing 150 pounds of marijuana; the informant provided the name and age of the driver, the make, model, appearance, and license plate number of the vehicle, and the vehicle's approximate

location. Officers stopped the car based solely on this information. ASC reversed. The Court acknowledged that an anonymous tip may in some circumstances be sufficient to support a stop, if it shows sufficiently detailed circumstances to indicate the informant came by his information in a reliable way; it also noted that when the tip fails to provide sufficient underlying circumstances demonstrating the reliability of the information, the reliability may be supplied by independent observations of the police corroborating the information in the tip. But, to provide reasonable suspicion, the tip must contain a range of details relating to not just easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. Ultimately, the Court concluded the tip leading to Altieri's arrest did not provide reasonable suspicion for the initial stop because it contained only neutral, non-predictive information about him and his activities. *Id.* ¶ 14.

The Court distinguished *Gates*, because in *Gates* the tip predicted future actions. *State v. Altieri*, 191 Ariz. at 4, ¶ 14. The Court also distinguished *White,* because the tip contained no private or future information about the defendant. There was no indication the information came from a person privy to defendant’s affairs, as opposed to any member of the general public who observed the direction Altieri was traveling; thus, it was not reasonable to believe the tip was reliable. *State v. Altieri*, 191 Ariz. at 4, ¶ 12. *But see* State v. Adair, 241 Ariz. 58, ¶ 29 (2016) (declining to extend *Altieri* in context of probationary search based on specific probation conditions and incriminating information from a known source).

Arizona cases have supported the general proposition that reliability is enhanced when an ordinary citizen volunteers information which he has come upon in the ordinary

course of his affairs, completely free of any possible ordinary gain. *State v. Gomez*, 198 Ariz. 61, 63, ¶ 15 (App. 2000), citing *State ex rel. Flournoy v. Wren,* 108 Ariz. 356, 364 (1972); *see also State v. Lawson,* 144 Ariz. 547, 552, (1985); *State v. Diffenderfer,* 120 Ariz. 404, 406 (1978). Citizen informants are presumed to be reliable, particularly when they have personally observed the criminal conduct they describe. *State v. Coats*, 165 Ariz. 154, 159 (App. 1990). Distinctions have been drawn between those who provide information for profit or favor and those who provide information voluntarily to police officers. *State v. Edwards*, 154 Ariz. 8, 12–13 (App. 1986) (peddler's information disclosing defendant as his source of stolen goods was sufficient where peddler had lived in rural area for more than 4 years with no nefarious activity and, because information given by peddler was easily verifiable, there was little profit in peddler's lying about source of goods to police).

In *State v. Gomez,* 198 Ariz. 61 (App. 2000), the Court distinguished *Altieri* because the tip was provided by a citizen complaint rather than a mere anonymous tip. The Court distinguished truly anonymous telephone calls that do not place the caller's credibility at risk from phone calls that are traceable, notwithstanding the caller's failure to identify herself during the call. There, because the caller had called 911 from her home telephone, making the call traceable, she had placed her credibility at risk, providing the necessary enhanced reliability of information volunteered by a disinterested private citizen. *Id.* At 64, ¶¶ 16-18.

The common thread in these cases is that an anonymous tip is not a sufficient and independent basis for reasonable suspicion unless it is reliable in its assertion of illegality, not just in its tendency to identify a determinate person. *State v. Canales*, 222

Ariz. 493, 496–97, ¶¶ 14-17 (App. 2009)(police lacked reasonable suspicion to detain defendant where an unidentified caller reported suspicious activity in a parking lot and gave a description of a suspicious car and license plate; although police were able to locate car that fit the general description with a license plate number close to that given, the tip provided no reliable information to support reasonable suspicion that the defendant was engaging in criminal activity). *See also United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) (search warrant of suspected drug dealer's house was not supported by probable cause based on anonymous tip that marijuana sale was made from house, where officers corroborated tip by merely confirming innocent facts without providing any indication of criminal activity).

(iii) Latest Developments

However, the United States Supreme Court has since backed away from this approach. In *Navarette v. California*, 134 S. Ct. 1683 (2014), the Court held that a detailed, contemporaneous report of suspicious activity to a 911 emergency dispatcher carries with it sufficient indicia of reliability when the details and location of the described events turn out to be correct. *Id*. at 1689-90 (anonymous 911 call by motorist was sufficiently reliable: by describing the make and model of truck and license plate number, motorist necessarily claimed eyewitness knowledge of alleged dangerous driving; the timeline of events, with police locating the pickup truck 18 minutes after the 911 call, suggested that motorist reported the incident soon after she was run off the road; and motorist's use of 911 system provided another indicator of her veracity, since that system provides some safeguards against making false reports).

The Court clarified that an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity; this is because ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations, and an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable. But under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. The Court noted that its decisions in *Alabama v. White* and *Florida v. J.L.* are useful guides. In *White,* the Court held police corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity; by accurately predicting future behavior, the tipster demonstrated a special familiarity with respondent's affairs, which in turn implied that the tipster had access to reliable information about that individual's illegal activities. The Court also recognized that an informant who is proven truthful about some things is more likely to tell the truth about others, including the claim that a person is engaged in criminal activity. But in contrast, in *Florida v. J. L.* the Court held that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. The tipster did not explain how he knew about the gun nor suggest he had any special familiarity with the young man's affairs; thus, police had no basis for believing the tipster had knowledge of concealed criminal activity. Further, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. *Navarette*, 134 S. Ct. at 1688.

The Court noted that another indicator of veracity is the caller's use of the 911 emergency system. 911 calls can be recorded, which provides victims with an

opportunity to identify the false tipster's voice and subject him to prosecution; the 911 system also permits law enforcement to verify important information about the caller. In 1998, the FCC began to require cellular carriers to relay the caller's phone number to 911 dispatcher; beginning in 2001, carriers have been required to identify the caller's geographic location with increasing specificity. And although callers may block call recipients from obtaining their identifying information, FCC regulations exempt 911 calls. The Court cautioned that tips in 911 calls are not *per se* reliable, but given these technological and regulatory developments, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call. *Navarette,* 134 S. Ct. at 689-90.

The Ninth Circuit recognized this development in overturning a district court decision relying primarily on *Florida v. J.L*. to suppress evidence. *United States v. Edwards*, 761 F.3d 977, 983–84 (9th Cir. 2014) (emergency 911 call in which anonymous caller reported suspect was shooting at passing cars provided police with reasonable suspicion for investigatory stop of suspect; caller reported ongoing and dangerous situation, was an eyewitness provided a specific location of the shooting, and called while simultaneously observing the event and described what he observed). As has the Arizona Supreme Court: "Thus, while recognizing the need to consider the totality of the circumstances – the whole picture – to determine whether an investigatory stop was based on a reasonable suspicion of criminal activity, the Court has concluded, '[U]nder appropriate circumstances, an anonymous tip can demonstrate sufficient indicia

of reliability to provide reasonable suspicion to make [an] investigatory stop,' without regard to the law enforcement officer's professional experience or other factors that might be relevant in a different context." *State v. Evans*, 235 Ariz. 314, 318, ¶ 11 (App. 2014), aff'd, 237 Ariz. 231, ¶ 11 (2015) (deputy not required before stopping truck to rule out possibility that arm movements he saw were consistent with swatting at an insect or playing air guitar; under the circumstances, the deputy had reasonable suspicion when he observed defendant flailing his fists toward the truck's passenger in a manner suggestive of or at least consistent with an assault), *quoting Navarette v. California,* 134 S.Ct. 1683, 1687-88 (2014).

2. Staleness

(i) Arizona

The Fourth Amendment requires that facts constituting probable cause be so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. *State v. Miguel,* 209 Ariz. 338, 341, ¶ 13 (App. 2004). Therefore, an affidavit used to support a search warrant must speak as of the time of the issue of that warrant. *Frimmel v. Sanders*, 236 Ariz. 232, 240, ¶ 31 (App. 2014).

Nevertheless, there is no arbitrary time limit on how old the factual information contained in the affidavit may be; the question of staleness depends more on the nature of the activity than on the number of days that have elapsed since the factual information was given. *State v. Hale*, 131 Ariz. 444, 446 (1982). Where facts are such that the magistrate may conclude the activity is of a continuous nature or in a course of conduct, the passage of time becomes less significant. *State v. Smith*, 122 Ariz. 58, 60 (1979)(evidence that defendant was retaining stolen equipment so he could rent it out

and that officers viewed on his premises items similar to those described by informant tended to cure any staleness in information relied upon for issuance of search warrant); *see also State v. Torrez*, 112 Ariz. 525, 528 (1975)(passage of three days between heroin purchase and issuance of warrant did not render warrant stale in light of protracted and continuous activity inherent in narcotic operation).

In *State v. Turney*, the Court held since there was no indication as to the dates of the occurrences referenced in the affidavit, they must be considered "stale." *State v. Turney*, 134 Ariz. 238, 241 (App. 1982). *Turney* cites *State v. Torrez*, *supra*, to support this proposition, but *Torrez* does not support that interpretation. *Torrez* cites to *United States v. Harris***,** *infr*a, and states "[t]he question of staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein" *Torrez*, 112 Ariz. at 528. The *Torrez* court concluded that "[t]he affidavit presented to the magistrate in support of the search warrant for appellant's residence also stated that two informants had been purchasing narcotics at defendant's place of business for periods from three to six months previous and as recently as three days." *Torrez*, 112 Ariz. at 528–29. *Torrez* made no reference to a lack of dates in the affidavit. Further, *Turney* was resolved using the *Aguilar-Spinelli* standard for search warrant which *Gates* overruled, *see Gates*, 462 U.S. at 238, *Spinelli v. United States*, 393 U.S. 410 (1969), *Aguilar v. Texas*, 378 U.S. 108 (1964), and thus any reliance on *Tunney* is misplaced.

(ii) Federal

A search warrant is not stale where there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the

premises. With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity. *United States v. Nance*, 962 F.2d 860, 864 (9th Cir. 1992). When the evidence sought is of an ongoing criminal business of a necessarily long-term nature rather than that of a completed act, greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time. *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) (2-year-old evidence of marijuana growth at residence was not too stale; evidence was based on informant who stated that he remodeled defendant's home to permit marijuana growth, and since marijuana growth is ongoing criminal business of long-term nature, greater lapses of time permitted when affidavit showed probable existence of activity at earlier time).

Further, the mere lapse of substantial amounts of time is not controlling in a question of staleness, particularly when the ongoing nature of a crime might lead to the maintenance of tools of the trade. *United States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988) (marijuana cultivation is a long-term crime and the affidavit included an experienced DEA agent's opinion that cultivators often keep the equipment at residences between growing seasons; further, documentary records sought were typically maintained over long periods of time). The continuous nature of the activity diminishes the significance of the time lag between the acts described in the affidavit and presentation of the affidavit to the magistrate. *United States v. Landis*, 726 F.2d 540, 542 (9th Cir. 1984). With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986). Evidence of the existence

of a widespread, firmly entrenched, and ongoing narcotics operation diminishes a defendant's staleness arguments. *United States v. Alvarez*, 358 F.3d 1194, 1203 (9th Cir. 2004); *citing United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1566 (9th Cir. 1989) (upholding warrant based in part on information almost 2 years old regarding defendant's involvement in widespread narcotics conspiracy). *See also United States v. Pitts*, 6 F.3d 1366, 1370 (9th Cir. 1993) (information leading to search of defendant's home for evidence of drug sales was not stale in view of allegation in search warrant affidavit that he was regular supplier of cocaine).

(iii) Corroborated Staleness

The 11th Circuit has specifically held that "even stale information is not fatal if the government affidavit updates, substantiates, or corroborates the stale material." *United States v. Harris*, 20 F.3d 445, 450 (11th Cir. 1994) (modified on other grounds). Although the 9th circuit has not used such explicit terms, it has upheld the search warrant where corroboration rehabilitated stale information. *United States v. Collins*, 61 F.3d 1379, 1384–85 (9th Cir. 1995)(in light of tip provided by defendant's acquaintance placing illegal firearms in defendant's home within 6 weeks of search, which updated older information regarding defendant's possession of firearms over 6 months earlier, it was not unreasonable for magistrate to conclude there was fair probability that firearms would be found at defendant's residence, despite staleness challenge); *United States v. Vaandering*, 50 F.3d 696, 700 (9th Cir. 1995) (although some information contained in officer's probable cause affidavit was as dated as far back as 22 months before search, information was not stale because older information was coupled with more recently obtained evidence); *United States v. Fernandez*, 388 F.3d 1199, 1254, n. 38 (9th Cir.

2004), *modified*, 425 F.3d 1248 (9th Cir. 2005), *citing Collins and Vaandering*; *United States v. Huberts*, 637 F.2d 630 (9th Cir. 1980) (probable cause existed on basis of alleged counterfeiting activities despite lapse of time since defendant showed informant counterfeit currency; time involved was only 1 month, evidence pointed to ongoing counterfeiting activities, nothing indicated defendants no longer possessed or were passing counterfeit currency, and observation by police shortly before arrest corroborated the information).

C. Neutral Magistrate

The point of the Fourth Amendment is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence; rather, its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Frimmel v. Sanders*, 236 Ariz. 232, 241-42, ¶ 40 (App. 2014). Absent evidence to the contrary, a reviewing court assumes that a magistrate performed his or her duty to inquire into the sources of a complainant's information and into the grounds of the complainant's belief. *State v. Hyde*, 186 Ariz. 252, 271 (1996).

A neutral and detached magistrate is one who has severed and disengaged himself or herself from the activities of law enforcement. *State v. Stanley*, 167 Ariz. 519, 525 (1991) (magistrate not precluded from acting in a neutral and detached capacity for going to crime scene to study affidavits and to sign search warrant, where magistrate did not participate in the search, did not inspect any items of evidence, was not involved in investigation or prosecution of the case, and had no affiliation with any police

department), citing *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). A magistrate does not wholly abandon his or her judicial role unless there is evidence of systemic or patent partiality. *State v. Hyde,* 186 Ariz. 252, 274–75 (1996).

D. Oath or Affirmation

Before issuing a warrant, the magistrate may examine on oath the person or persons seeking the warrant, and any witnesses produced, and must take his affidavit, or their affidavits, in writing and cause the affidavit to be subscribed by the party or parties making the affidavit. Before issuing the warrant, the magistrate may also examine any other sworn affidavit submitted to him which sets forth facts tending to establish probable cause for the issuance of the warrant. A.R.S. § 13-3914(A).

An affidavit is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true. *In re Wetzel,* 143 Ariz. 35, 43 (1984). It is an axiom of our legal system that an oath or affirmation is not a mere formality. A sworn oath is one made under penalty of perjury. *See Purcell v. Superior Court*, 109 Ariz. 460, 462 (1973); *Otel H. v. Barton*, 208 Ariz. 312, 314, ¶ 7, 93 P.3d 512, 514 (App. 2003), *as amended* (June 30, 2004); JV-11426 v. Superior Court, 159 Ariz. 357, 358 (App. 1988). The oath serves a unique and critical purpose in assuring the reliability of evidence presented to the court. While an attorney's submission of a signed document surely carries ethical weight, mere signing of a document does not ordinarily subject the signer to the penalty of perjury. *State v. Salazar*, 231 Ariz. 535, 537, ¶ 10 (App. 2013).

In lieu of, or in addition to, a written affidavit, the magistrate may take an oral statement under oath which shall be recorded on tape, wire or other comparable

method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication. This statement is deemed to be an affidavit for the purposes of issuance of a search warrant. If a recording of the sworn statement is made, the statement shall be transcribed at the request of the court or either party and certified by the magistrate and filed with the court. A.R.S. § 13-3914(C).

Under Arizona law it is clear that a search warrant must be supported by written affidavit or recorded oral testimony given under oath. *State v. Smith*, 112 Ariz. 531, 536 (1975). Only sworn testimony in addition to the affidavit can be appropriately considered by the magistrate. It is not necessary, however, that the testimony be in writing. *State ex rel. Flournoy v. Wren*, 108 Ariz. 356, 363 (1972). The failure to record the statements made to obtain a telephonic search warrant or to make them under oath will render the warrant invalid. *State v. Hadd*, 127 Ariz. 270, 274–75 (App. 1980); *citing State v. Boniface*, 26 Ariz.App. 118 (1976). *Compare, State v. Moody*, 208 Ariz. 424, 447, ¶ 70, n. 7 (2004) (telephonic search warrant was valid, though transcript of recorded affidavit supporting warrant showed that recording had cut off court's order authorizing the warrant, where recording contained affiant detective's oath, her description of facts of case, substantial evidence linking defendant to the murders, defendant's name, and complete list of physical evidence requested).

E. Particularity

The historical purpose of the Fourth Amendment was to prevent general, exploratory searches and seizures. General warrants are prohibited by the Fourth Amendment; the problem posed by the general warrant is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. The Fourth

Amendment addresses the problem by requiring every search warrant to "particularly" describe "the place to be searched, and the persons or things to be seized." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). This limitation safeguards the individual's privacy interest against the wide-ranging exploratory searches the Framers of the Constitution intended to prohibit. *State v. Adams*, 197 Ariz. 569, 574, ¶ 25 (App. 2000)(warrant for search of theater that did not mention existence of private residence within the building, despite police records showing officers knew defendant lived there, lacked sufficient particularity), citing *Andresen v. Maryland,* 427 U.S. 463, 480 (1976).

The "particularity" requirement must be construed in a common sense, realistic fashion rather than in an abstract, hypertechnical manner. *United States v. Ventresca*, 380 U.S. 102, 109 (1965). Since affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation, reviewing courts should not take a grudging or negative attitude towards them, and the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Id*. at 108. An affidavit for a search warrant must be tested in a common-sense and realistic fashion; if a magistrate has found probable cause, a warrant should not be invalidated by a hyper-technical interpretation. *In re One 1974 Ford Van*, 111 Ariz. 522, 523 (1975).

Because of the privacy interests at stake in computers and the large amount of personal information available therein, a warrant that does not specify that officers intend to search a computer is not sufficiently particular to authorize such a search. *State v. Dean*, 241 Ariz. 387, ¶ 16 (App. 2017), citing *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) (“Where ... the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance.”); *United States*

v. Christie, 717 F.3d 1156, 1164 (10th Cir. 2013) (“[T]he particularity requirement and its underlying purposes are fully engaged when investigators seek to search a personal computer.”). “As an irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized.” *Dean*, 241 Ariz. at ¶ 20, quoting *United States v. Leary*, 846 F.2d 592, 602 (10th Cir. 1988).

A defective description of the property to be seized may be saved by an adequate description in the affidavit establishing probable cause to issue the warrant; to do so, it must appear at a minimum that the executing officer had the affidavit with him and referred to it. *State v. Moorman*, 154 Ariz. 578, 583 (1987). In *Moorman*, due to an error the search warrant itself contained no description of the items to be seized. However, the affidavit supporting the search warrant contained a complete description of the items to be seized; the magistrate signed both the warrant and the affidavit, and the warrant itself referred to the items to be searches as being "more fully described in the affidavit." ASC held the description in the affidavit saved the defective warrant from being an exploratory warrant, and that this type of technical mistake does not require suppression. *Id. See also State v. Terrell*, 156 Ariz. 499, 501-02 (App. 1988)(remanded for evidentiary hearing where warrant stated items were “more fully described in the affidavit,” but not clear whether the officer had affidavit with him when he executed the warrant or who prepared a second warrant).

In *State v. Lavers*, 168 Ariz. 376, 384 (1991), the search warrant authorized the search for and seizure of weapons, blood, fingerprints, and “any and all evidence” relating to the homicide of the listed victim. Relying on *Andresen* and *Moorman*, ASC held the warrant was not unconstitutionally overbroad because it limited the search to

evidence concerning the particular murder described in the search warrant. Similarly, in *State v. Ray*, 185 Ariz. 89 (App. 1995), based on their surveillance of the defendant's salvage yards during a chop shop investigation, the police executed search warrants that listed specific property and also authorized searches and seizures of “any major component vehicle part” bearing a VIN or missing or altered VIN plate. The Court found the warrant was properly narrowed, stating: “When deciding whether a warrant is too general, the trial court must consider the nature of the property sought to be recovered.” *Id*. at 93. Since the nature of an auto “chop shop” typically involves many removable vehicle parts, it would be impossible for the police to describe exactly what they would find. The Court also noted the police did not examine categories of vehicle parts that did not bear VIN or serial numbers.

In *State v. Coats*, 165 Ariz. 154, 160 (App. 1990), the affidavit attached to the search warrant described the place to be searched as the defendant's residence, a trailer "behind Lone Oak Trailer Park”; the affidavit further gave a physical description of the trailer. Coats challenged the search warrant, arguing the trailer was actually near the "Lonesome Pine Trailer Park" and not the "Lone Oak" park 15 miles away. The court upheld the search warrant because although the name of the trailer park might have been erroneous, the other information sufficiently identified the place to be searched. But in *State v. Williams*, 184 Ariz. 405, 408 (1995), an informant provided a sketch of the defendant's trailer and surrounding area. The resulting search warrant listed the address as Eager Street, but the attached affidavit with the informant’s sketch listed the address as Garth Street; further, the affidavit referred to the trailer as "small" but the sketch showed it was the largest of several trailers on the property, and the affidavit did

not give any physical description of the trailer. The Court held the officer failed to give the required "narrow and adequate description of the place to be searched" and the warrant was thus insufficient.

1. Severability

In *Andresen v. Maryland,* 427 U.S. 463, 480 (1976), SCOTUS found that an entire search warrant was not general and that materials related to the specific crime of false pretenses could be seized; to the extent such papers were not within the scope of the warrant or were otherwise improperly seized, “the State was correct in returning them voluntarily and the trial court was correct in suppressing others.” *Andresen v. Maryland,* 427 U.S. 463, 482, n. 11 (1976). This language has been interpreted to mean that the invalid portions of a warrant may be stricken and the remaining portions held valid so that seizures pursuant to the valid portions will be sustained. *State v. Roark*, 198 Ariz. 550, 553, ¶ 9 (App. 2000), citing *United States v. Spilotro,* 800 F.2d 959, 967 (9th Cir.1986); *State v. Maddasion,* 130 Ariz. 306, 308 (1981) (“The entire warrant should not be rendered invalid because portions of it might be vulnerable to challenge.”).

Under the severability doctrine, the valid portions of the warrant must be supported by probable cause and be sufficiently specific to support severance. Each part of the warrant must be examined separately to determine whether it is impermissibly general or unsupported by probable cause. If the valid portions are “meaningfully severable” from the entire warrant, the trial court may redact the invalid phrases and suppress only the evidence seized pursuant to these invalid portions. A court may decline to sever a warrant if most of its provisions are invalid for lack of

specificity. A court may also determine that total suppression is necessary because of flagrant disregard of the limits of the warrant. Partial suppression is an acceptable middle ground between suppressing or admitting all the evidence. *State v. Roark*, 198 Ariz. 550, 553, ¶¶ 10-12 (App. 2000).

See also AZ Briefs – Revised, Fourth Amendment / Exclusionary Rule, pp. 6-21.

F. Service of Warrant: Knock and Announce Rule

Under A.R.S. § 13-3916(B), an officer may break into a building, premises or vehicle or any part of a building, premises or vehicle, to execute the warrant when: (1) after notice of the officer's authority and purpose, the officer receives no response within a reasonable time; (2) after notice of the officer's authority and purpose, the officer is refused admittance; (3) a magistrate has authorized an unannounced entry pursuant to § 13-3915; or (4) the particular circumstances and the objective articulable facts are such that a reasonable officer would believe that giving notice of the officer's authority and purpose before entering would endanger the safety of any person or result in the destruction of evidence.

Police entrance through an open doorway can be considered a “breaking” within the meaning of Arizona's “knock and announce” statute. The essence of the knock and announce statute is the proscription against unannounced intrusions whether they occur through locked doors, partially open doors or wide open doors. *State v. LaPonsie*, 136 Ariz. 73, 74 (App. 1982). The circumstances of each case will determine what constitutes a reasonable time under A.R.S. § 13–3916(B)(1) and a refusal of admittance under A.R.S. § 13–3916(B)(2). *Id*. at 74–75, citing: *State v. Bates,* 120 Ariz. 561, 587 P.2d 747 (1978)(absent exigent circumstances, a 3-to-5 second wait following the

announcement of authority and purpose was unreasonable); *State v. Brady,* 105 Ariz. 592 (1970); *State v. Eminowicz,* 21 Ariz.App. 417 (1974)(breaking and announcement that occurred simultaneously or at least prior to any time for a response violated the reasonable time requirement of the knock and announce statute). *Accord, State v. Cohen*, 191 Ariz. 471, 472–73, ¶ 6 (App. 1998).

The Court in *LaPonsie* concluded that the police violated the knock and announce rule, noting:

> Although the appellee, by leaving his front door wide open, may have lowered his expectation of privacy to the extent that passersby might have a clear view into his residence, we cannot say that such a lowered expectation extends an "open-house" invitation to enter. Likewise, the fact that persons inside the house observed a man carrying a shotgun approach the house does not … constitute an announcement of authority and purpose sufficient to satisfy the mandate of A.R.S. § 13–3916(B).

State v. LaPonsie, 136 Ariz. at 75. Compare: *State v. Dixon*, 125 Ariz. 442, 444 (App. 1980)(where police officers gave requisite notice by knocking and announcing their purpose to search defendant's mobile home pursuant to telephonic search warrant, they received no answer even though they had been observed by someone in mobile home, and they heard sounds consisting of scurrying noises inside that militated against delay, they had waited reasonable time before forcibly entering home).

In *Richards v. Wisconsin,* 520 U.S. 385 (1997), SCOTUS reviewed a court-created rule that police can make a "no knock" entry when executing a search warrant in a felony drug case. In rejecting that rule, the Court held that in order to justify a "no knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example,

allowing the destruction of evidence. *Id.* at 394. Arizona case law is consistent with *Richards,* except that ASC requires more than "reasonable suspicion" to justify a "no knock" entry. *State v. Cohen*, 191 Ariz. 471, 473, ¶ 8 (App. 1998) (police had no reasonable suspicion of exigent circumstances to justify no-knock entry of townhome to execute search warrant for drugs, where they had seen no weapons during 3-month surveillance or when looking through window immediately before executing warrant and where they had seen far more marijuana carried into townhome than could be rapidly destroyed).

However, SCOTUS has since held that under the Fourth Amendment, a violation of the knock-and-announce rule does not require suppression of evidence obtained pursuant to a valid search warrant for a home. In *Hudson v. Michigan,* 547 U.S. 586 (2006), police violated the knock-and-announce rule by entering a home too quickly (3-to-5 seconds) after announcing their presence when executing a search warrant for drugs and firearms. The Court held the knock-and-announce violation was too attenuated from the seizure of evidence to justify suppression. *Id.* at 594. There was a valid search warrant and the challenged entry was merely an "illegal *manner* of entry" or a "preliminary misstep," distinct from the subsequent seizure of evidence. *Id.* at 592. The Court explained:

> Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different – and do not include the shielding of potential evidence from the government's eyes.

Id. at 593 (citation omitted).

Although ASC has determined that Ariz. Const. Art. 2, § 8 may provide broader protection than the Fourth Amendment in the context of *warrantless* searches of homes, Arizona courts have not yet applied Art. 2, § 8 to grant broader protections against search and seizure than those available under the federal constitution. *State v. Roberson*, 223 Ariz. 580, 582–83, ¶ 13 (App. 2010). The distinction between a warrantless home search and a search conducted pursuant to a valid warrant is constitutionally significant, as searches and seizures inside a home without a warrant are presumptively unreasonable. Although unlawful entry of homes was the chief evil which the Fourth Amendment was designed to prevent, a homeowner has no right to prevent a law enforcement officer with a valid warrant from entering his home. *Roberson*, 223 Ariz. at 583, ¶ 14.

The Court concluded that *Hudson's* determination that the knock-and-announce rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant is wholly consistent with Arizona's constitution and appellate precedents. *Id*. Moreover, the Court noted that A.R.S. § 13-3925 now provides: "Any evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of this chapter except as required by the United States Constitution and the constitution of this state." *Roberson*, 223 Ariz. at 583-84, ¶ 16 (violation of the knock-and-announce rule did not warrant suppression of evidence; police had a valid search warrant for house and their manner of entry had nothing to do with the subsequent seizure of evidence).

See also AZ Briefs-Revised, Fourth Amendment / Exclusionary Rule, Good Faith Exception, pp. 7-21.

II. Anticipatory Warrants

Under A.R.S. § 13-3913, "No search warrant shall be issued except upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched." Thus, before a magistrate may ordinarily issue a search warrant, the magistrate must find that, *at the time the warrant is issued*, there is probable cause to believe that evidence of a crime exists *at that time* at the place described in the warrant. *See* A.R.S. § 13-3912 (2), (4).

However, search warrants do not necessarily violate either the Arizona or United States Constitutions when they are issued upon probable cause to believe both that a crime is occurring and that evidence of such crime will be found at a specified location sometime in the future. *State v. Crowley,* 202 Ariz. 80, 84-85 ¶ 10 (App. 2002); *see also State v. Berge,* 130 Ariz. 135, 137-38 (1981). Such warrants are considered anticipatory because the item to be seized has not yet reached the location to be searched at the time the warrant is obtained; they are issued with the understanding that they will not be executed until the item reaches that location. *See State v. Cox,* 110 Ariz. 603, 608 (1974). But such warrants are still subject to the traditional requirement probable cause must exist to believe a crime has been or is currently being committed at the time they are issued. *State v. Vitale,* 23 Ariz.App. 37, 38-39 (1975).

The "future time" for the prospective warrant to be served must be within a reasonably short time after the warrant is issued. Prospective warrants are properly issued "to be served at some time not unreasonably distant for a crime … that is in progress or it is reasonable to assume will be committed in the near future." *State v. Cox*, 110 Ariz. 603, 608 (1974)(affidavit for search warrant was sufficient to establish

probable cause where it recited that car containing marijuana was traveling from Tucson to Flagstaff, informant had seen marijuana in the car, informant had in the past provided information leading to arrests, and informant had previously obtained marijuana from one of the people traveling to Flagstaff). In *Cox*, ASC held that an "anticipatory or delayed execution" warrant is the only practical way that a warrant can be obtained to search a moving automobile on the highway.

In *Mehrens v. State*, 138 Ariz. 458 (App. 1983), the State issued a subpoena duces tecum ordering defense counsel to produce incriminating letters the defendant had given him; after counsel claimed attorney-client privilege, the trial court quashed the subpoena and had counsel turn the letters over to the court pending special action proceedings. After the appellate court ruled that counsel could not be compelled to produce the letters, the trial court ordered him to pick up the letters before 9 a.m. on a particular date. The State obtained a search warrant to search counsel for the letters that morning after he left the court. Counsel complained the search warrant was invalid because there was no probable cause to believe the letters were in his possession at the time the warrant was issued, but the Court found no error, holding the prospective warrant was valid because the affidavit supporting the warrant showed "the right to search will exist within a reasonable time in the future." *Mehrens*, 138 Ariz. at 461. The Court noted "the better practice is for the warrant to provide that execution of the warrant will not occur until the happening of a specified event." *Id.* at 458.

However, an anticipatory warrant is invalid if the only evidence of probable cause is the very evidence that the government's agents will be providing to the suspect through a controlled delivery. "[I]t is not reasonable to base search warrant upon acts

that can only come into being by actions of persons seeking the warrant." *State v. Crowley*, 202 Ariz. 80, 84-85, ¶ 10 (App. 2002), *quoting State v. Berge*, 130 Ariz. 135, 137-138 (1981). This is often the case in controlled delivery cases.

"Controlled delivery" cases usually involve packages of contraband addressed to a suspect and sent by mail or private shipping; such packages may be intercepted by the package carrier or the police for one reason or another – for example, the carrier may smell the odor of marijuana coming from a box, or the package may have been damaged, revealing contraband. The carrier may have suspicions and open a package before calling police, or may contact the police with their concerns. If the carrier opens the package, its contents may be observed to be contraband; if not, a trained police dog may "alert" to the package, or other evidence may give the police sufficient probable cause for the police to obtain a warrant to open the package. If the package proves to contain contraband, the police may remove some of the contents, or spray the contents with powder visible only under black light, or install a device that will trigger a remote alarm when the package is reopened. Then the police rewrap the package and arrange to have a "controlled delivery" made to the suspect, often by a police officer disguised as a delivery person, planning to arrest the suspect after delivery is made. The delivery of the package to the suspect is the "triggering event" for execution of the anticipatory warrant. Such a warrant ordinarily authorizes not just a search of the package itself, but also a search of the residence or other location where the suspect receives the package and the suspect's person where contraband might be concealed. In other words, the package delivery location (usually the suspect's home) is the target location for the search.

For example, in *State v. Crowley*, 202 Ariz. 80 (App. 2002), a customs officials intercepted a package addressed to Crowley after a police dog "alerted" to it; a postal examiner opened the package and found drugs. After confirming Crowley lived at the address on the package, a police officer informed a magistrate, stated he would deliver the package to Crowley that day, and obtained a search warrant to be executed the following day; the warrant authorized police to search Crowley's residence for the package and any other evidence relating to illegal drugs. But there was no evidence Crowley had expected the package or mailed it to himself and no other evidence that he was involved with illegal drugs. The police put an electronic device in the package that would signal when the package was opened and attempted to deliver the package to Crowley on the day specified in the warrant, but no one was home. An officer eventually delivered the package three days later; Crowley accepted it but put it on a shelf and did not open it. The police executed the warrant an hour later and found the unopened package, as well as drugs and paraphernalia. In affirming the suppression of the evidence, the Court noted: "Certainly, the contraband will be found if law enforcement officers have arranged for its presence." *Crowley*, 202 Ariz. at 86, ¶ 14. The Court further noted there was no evidence except for the package itself that Crowley was doing anything illegal, and "the possibility for mischief" that would exist if the mere mailing of a package of contraband to an unknowing recipient could justify a search warrant. *Id*. at ¶ 20.

In *State v. Berge*, 130 Ariz. 135 (1981), an informant told police that someone from Atlanta was sending Berge packages of drugs via UPS for him to sell in Phoenix. After a drug-sniffing dog alerted on a package addressed to Berge bearing an Atlanta

return address, police obtained a search warrant and opened the package, finding drugs and cash. The police sprayed the package and its contents with fluorescent powder, rewrapped the package, and arranged for an officer disguised as a UPS deliveryman to deliver it to Berge; they then got a second warrant to search Berge's person and residence after the package was delivered. Berge accepted delivery of the package but drove away before the police could execute the second warrant. The police entered the residence on the second warrant and did not find the package, but found drugs and paraphernalia. Berge returned shortly thereafter and was arrested. The police found drugs and cash on him, and the cash and his hands showed the fluorescent powder under black light. The evidence was suppressed and ASC affirmed, noting: "We do not believe that it is reasonable to base a warrant upon future acts that can only come into being by actions of the persons seeking the warrant." *Id*. at 137. Thus, the warrant in *Berge* was invalid because at the time the warrant was issued, the police had no knowledge of any illegal activity at Berge's address.

Similarly, in *State v. Vitale*, 23 Ariz. App. 37 (App. 1975), acting on an informant's tip that Vitale was fencing stolen property, police attempted to catch him in the act of receiving stolen property by having the informant offer to sell him a stolen television set. A warrant was issued to search Vitale's pawnshop with the understanding that its execution was contingent upon Vitale's purchase of the television. When Vitale subsequently agreed to buy the television from the informant, officers executed the warrant, and he was arrested for receiving stolen property. The warrant was held invalid because "there was no evidence of a crime having been committed at the time the warrant was issued." *Id.* at 40. The Court distinguished *Cox,* because in *Cox* there had

been probable cause to believe the crime of transportation of marijuana was currently being committed, although officers could not execute the warrant until the vehicle entered Coconino County. *Vitale,* 23 Ariz.App. at 40-41; *Cox,* 110 Ariz. at 608. Thus, the lynchpin to the validity of a search warrant is "whether there was reasonable ground to believe a crime was being committed" at the time the warrant is issued. *Berge,* 130 Ariz. at 137-38.

III. Challenge to Search Warrant

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that a defendant may challenge the truthfulness of factual statements in an affidavit supporting a warrant. The evidence seized under the warrant will be suppressed if the defendant can show by a preponderance of the evidence that (a) the affiant made a false statement, which was knowingly or intentionally false, or which was made in reckless disregard for the truth; and (b) the information remaining in the affidavit once the false statement is removed is insufficient to establish probable cause. *Id*. at 155-56.

"Given the potential for abuse of the *ex parte* procedure by which warrants are issued, the defendant may challenge a search warrant based upon false or incomplete information." *Frimmel v. Sanders*, 236 Ariz. 232, 239, ¶ 26 (App. 2014); *citing State v. Buccini*, 167 Ariz. 550, 558 (1991); *Franks*, 438 U.S. at 168–69. The challenge must be on a factual basis as opposed to alleged contradictions which represent a difference of opinion. *United States v. Fernandez*, 388 F.3d 1199, 1255 (9th Cir. 2004)(defendants not entitled to *Franks* hearing to attack facially valid affidavit underlying search warrant for residence where affidavit did not contain material misstatements or omissions and magistrate's conclusion that supporting affidavit established probable cause to search

residence was not clearly erroneous). "Although an innocent or negligent mistake does not constitute a *Franks* violation, the use of out-of-date information as an expression of current status tends to support a claim of recklessness." *Frimmel*, 236 Ariz. at 240, ¶ 31.

In *Frimmel*, MCSO received information that a restaurant chain owned by Frimmel illegally hired undocumented persons to work at its restaurants; after a year-long investigation, MCSO obtained three search warrants supported by three virtually identical affidavits to search the Phoenix and Peoria locations, as well as Frimmel's home. During the execution of the search warrants, ten employees were arrested and four were later convicted of identity theft. Upon completion of the investigation, Frimmel was arrested and charged with various felonies; the same day, MCSO obtained two additional warrants based on two additional affidavits to search the cell phones of Frimmel and a restaurant manager. Frimmel moved to suppress, detailing each statement in the affidavits he believed to be false or incomplete and identifying portions of public records and MCSO reports that contained contradictory and relevant omitted information. *Frimmel*, 236 Ariz. 232, 235–38, ¶¶ 2-21. The trial court denied Frimmel's request for an evidentiary hearing and denied the motion.

On appeal, the Court considered whether Frimmel made the requisite substantial preliminary showing prescribed by *Franks. Frimmel*, 236 Ariz., 239, ¶ 29. First, regarding his allegations of deliberate falsehood and reckless disregard for the truth, the Court explained that a search warrant affidavit is presumed to be valid and thus a challenge to its sufficiency must be more than conclusory or speculative. The defendant must make specific allegations of deliberate falsehoods or reckless disregard for the

truth, with reference to the relevant portion of the warrant, and support the allegations with a detailed offer of proof and statement of supporting reasons. Further, a search warrant affidavit must be read in a common sense and realistic manner. Although an innocent or negligent mistake does not constitute a *Franks* violation, the use of out-of-date information as an expression of current status tends to support a claim of recklessness. *Id*. at 240, ¶¶ 30-31. The Court found the affidavits were based heavily upon information from informants who had, at best, limited personal knowledge of Frimmel's hiring and record-keeping practices, and that the timeliness of the information they provided expired long before the warrant was sought. *Id.,* ¶ 32.

Second, the Court explained that failure to disclose the history, background, and motivation of an informant may be a material omission from a search warrant affidavit. There, the affidavits provided virtually no background information on any of the informants, thereby depriving the magistrate of the opportunity to meaningfully and neutrally evaluate the veracity of the informants, much less the information they provided to MCSO. Further, while every fact in the affidavit need not be true, law enforcement officers are not permitted to exaggerate known facts to falsely substantiate the magnitude of a crime or create probable cause where none exists. The Court found based upon the documentation and information provided, the affiants exaggerated the strength of the allegations levied against Frimmel by overstating the evidence against him and overstating the existence of business activity at his home when MCSO apparently had little, if any, actual knowledge of the details of Frimmel's hiring practices. “It is not within the power of an affiant, within the strictures of the Fourth Amendment, to

alter an honest “maybe” to a false “yes” in order to obtain a warrant.” *Frimmel*, 236 Ariz. at 241, ¶¶ 33-35.

Third, the Court noted that the unexplained failure to discover and/or disclose written information prepared by and readily available to law enforcement agents through the course of their investigation tends to corroborate a defendant's charge that the affiant acted recklessly. There, the affiants misstated or omitted important, material facts either contained within MCSO's own investigative reports or other obvious, available public records, with no explanation for the failure to review the reports to ensure the integrity of the affidavits supporting the requested warrants. The Court concluded that given the seemingly pervasive misstatements of basic facts and numerous misrepresentations and omissions of material facts, Frimmel made a substantial preliminary showing that false statements and material omissions were made with, at a minimum, reckless disregard for the truth. *Frimmel*, 236 Ariz. at 241, ¶¶ 36, 37.

Next, the Court considered whether the remaining content of the affidavits was sufficient to support a finding of probable cause; in order to do so, the Court first redrafted the affidavits to remove the falsehoods and add in material omitted facts, and then considered whether, under the totality of the circumstances, the redrafted affidavits sufficiently support a finding of probable cause. *Frimmel*, 236 Ariz. at 241, ¶ 38. The Court noted that had the affiants simply provided the magistrate with only accurate and reliable information, as supported by MCSO's own report and public record, they would have reported that a number of individuals hired by the restaurants the previous year were using Social Security numbers connected to more than one name, more than one address, only an out-of-state address, or unconnected to any name or address. But

what was lacking was credible evidence to support any complicity by Frimmel; any such complicity appeared to be purely conjecture. *Frimmel*, 236 Ariz. at 241, ¶ 39. The Court noted that probable cause cannot be established by mere suspicion that a search will reveal items connected to criminal activity. The point of the Fourth Amendment is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence, but that its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Id*. at 241-242, ¶ 40.

The Court found Frimmel was entitled to an evidentiary hearing to examine the sufficiency of probable cause supporting the warrants. The Court noted that while evidentiary hearings into an affiant's veracity cannot be obtained upon a bare allegation of bad faith, here, Frimmel made a substantial preliminary showing of numerous false statements, misrepresentations and/or material omissions contained within the affidavits submitted in support of the warrants that could have affected the magistrate's evaluation of probable cause. The Court held that where there is significant doubt about the propriety of police practice and its impact on an important credibility determination supporting a probable cause conclusion, the courts should exercise caution on the side of the Fourth Amendment and improved police practices. *Frimmel*, 236 Ariz. at 242, ¶¶ 41, 42.

In *State v. Buccini*, 167 Ariz. 550 (1991), Buccini was suspected of setting a bomb and an officer was dispatched to Buccini's apartment to question him. Buccini explained he had been with friends and gave the names of at least two alibi witnesses,

signed a form giving the officer permission to search his apartment, and even helped the officer do the search. The officer found gunpowder and fuses, but Buccini explained that he worked at an ammunition shop and reloaded ammunition as a hobby, and had experimented with other explosives. Because Buccini had to go to work, the search ended after the officer took the gunpowder and fuses. The officer then made a telephonic request for a search warrant. In his affidavit, the officer falsely told the magistrate Buccini said he had no alibi witnesses, and also falsely implied Buccini tried to terminate the search before the officer was finished. The magistrate issued a warrant and the officer searched Buccini's apartment, seizing evidence. The evidence was suppressed and ASC affirmed, noting that the purpose of the Fourth Amendment is to have a magistrate rather than an officer determine whether there is probable cause. *Id*. at 557. In this case, "the officer's deliberate or reckless omission and misstatement of material facts indicates that he was acting mainly on a suspicion or hunch" rather than on a reasonable conclusion that there was probable cause to search. *Id*.

Compare: *State v. Carter*, 145 Ariz. 101 (1985). There, the defendant claimed the officer who prepared the affidavit for the search warrant either misstated facts or failed to disclose facts arguably in his favor, such as the fact that the victim did not positively identify him. ASC found that regardless of whether the defendant had shown the first prong of the *Franks* test, he had failed to show the second prong, because "[p]lainly, even when the affidavit is redrafted to take account of the excluded facts, there is sufficient information to support a finding of probable cause." *Id*. at 110.